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IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~1074~~ 108

DOANE AGRICULTURAL SERVICE, INC.,
Petitioner,

vs.

A. W. COLEMAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

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vs.

A. W. COLEMAN,
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PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I.

STATEMENT OF GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The opinion of the U. S. Court of Appeals for the Sixth Circuit review of which is sought by this petition is not yet reported officially or unofficially. It was rendered by that Court on April 4, 1958, and a copy is attached as Appendix A to this petition. A petition to rehear was filed in said Court on April 19th, 1958, and was denied on May 1, 1958, without opinion. Thereafter the mandate of said Court is-

sued, a copy of which mandate is attached as Appendix B. It is by the judgment of said Court embodied in this mandate, together with the opinion rendered in support thereof, that petitioner is aggrieved and of which it now seeks review in this Court.

Jurisdiction of this Court is invoked under *Title 28 Sec. 1254, U. S. Code*, reading in part as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

II.

QUESTION PRESENTED FOR REVIEW.

A single question is presented for review by this petition. It is whether where a Trial Court peremptorily instructs a jury that the master-servant relationship exists, a court of appeals is justified in affirming on the sole ground that there was in the record evidence from which the jury could have so found. Obviously the answer should be "no"; and yet in the instant case the Court of Appeals so held, by holding that the action of the Trial Court in instructing the jury that the two individuals alleged to be responsible for respondent's injuries, Guarr and Mitchell by name, were the "agents, servants or employees" of petitioner (R. pp. 113a, 120a. References prefixed by the letter "R." are to pages of the Joint Appendix of Appellants filed in the Court of Appeals in this case) should be affirmed on the ground that "the jury could find that Guarr and Mitchell were employees of Doane" (Op. p. 5a. References prefixed by the letters "Op." are to pages of the Opinion of the Court of Appeals in the instant case) and

that therefore "the jury was warranted in finding as a fact that Guarr and Mitchell were employees of Doane" (Op. p. 3a), when in fact the jury made no such finding and was given no opportunity to do so.

III.

CONSTITUTIONAL PROVISION INVOLVED.

Petitioner relies upon the Seventh Amendment to the United States Constitution, which reads as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

In the instant case a jury was demanded (R. p. 4a) and the trial was in fact held before a jury (R. p. 18a). Yet the Court of Appeals for the Sixth Circuit held that one of the vital issues in the case, namely the agency of the persons causing respondent's injuries, which was withheld by the Trial Court from the jury, was rightly decided against petitioner because there was evidence from which a jury could have so found had that issue been submitted to it. Petitioner was thereby deprived of its right to a jury trial upon that issue.

IV.

STATEMENT OF THE CASE.

Respondent, A. W. Coleman (hereinafter called "plaintiff"), received personal injuries as a result of having his arm caught in a hay baler while working on a farm belonging to Reynold K. Hughes, d/b/a Fayette Stock Farm

(hereinafter called "co-defendant") (R. p. 23a). At the time, the baler was being operated by a certain Jimmy Mitchell (R. p. 23a). The arrangements for plaintiff to work on the hay baler had been made by a certain Mr. Guarr, manager of the Hughes farm (R. p. 19a). Petitioner, Doane Agricultural Service, Inc. (hereinafter called "defendant"), was under contract to co-defendant, Reynold K. Hughes, d/b/a Fayette Stock Farm, to perform certain management services in connection with his farm (R. pp. 30a-33a). Two material questions involved in the suit (which are separate and should not be confused) are therefore: (a) Was defendant an agent of co-defendant or an independent contractor, and (b) in either event, were Guarr and Mitchell the employees of defendant or of co-defendant? It is to the manner in which this latter question (as distinguished from the first) was determined by the lower courts that this petition is directed.

Suit was filed by plaintiff in the United States District Court for the Western District of Tennessee seeking the recovery of damages for his personal injuries against both defendant and co-defendant on the ground that those injuries resulted from negligence on the part of their agents, servants and employees. Jurisdiction was asserted on the ground of diversity of citizenship and the amount involved, under Title 28, Sec. 1332, United States Code (R. p. 3a). At the trial, plaintiff undertook to introduce evidence that his injuries were due to negligence on the part of the supervisor and operator of the hay baling machine (Guarr and Mitchell, R. pp. 23a-24a) and that they were the employees of defendant, who was in turn the agent of co-defendant (R. pp. 29a-33a). It was solely upon this alleged relationship that the charge of liability on the part of defendant was predicated. On the other hand, defendant throughout the trial took the position that Guarr and

Mitchell were employees of its co-defendant, Reynold K. Hughes, d/b/a Fayette Stock Farm (R. pp. 50a, 58a-61a), and offered evidence in support of its position. For example, J. N. Moffett, a witness offered by defendant, testified as follows:

> "Q. Now, so far as Mr. Guarr is concerned, he is the farm manager that was recommended by you?
>
> A. That is right.
>
> Q. And was employed by Mr. Hughes?
>
> A. Yes, sir."
>
> (*R. p. 58a.*)

Mr. Hughes himself confirmed this:

> "Q. And upon their (defendant's) recommendation Mr. Guarr was employed as farm manager for the Fayette Stock Farms?
>
> A. Yes, sir."
>
> (*R. p. 50a.*)

Yet, in its charge to the jury, the Trial Court referred to the "negligent act, or acts, of Doane Agricultural Service, its agents, servants or employees, Mr. Guarr or Jimmy Mitchell" (R. p. 113a), and again to "Doane Service, or the latter's agents, servants or employees" (R. p. 120a), by which are obviously meant Guarr and Mitchell. (See Op. p. 2a, where the Court says that the jury "by its verdict, necessarily found that the injury to Coleman resulted proximately from some fault of Mitchell, or of Guarr, or of both.") In other words, by assuming throughout its charge that Guarr and Mitchell were the agents, servants and employees of defendant, the Trial Court foreclosed any consideration of this question by the jury, and this in the face of substantial evidence which is at least conflicting as to whether they were in fact its agents or those of its co-defendant, Reynold K. Hughes, d/b/a Fayette Stock Farm.

A verdict was rendered for plaintiff against both defendant and co-defendant, and judgment entered thereon. Prior thereto, defendant had excepted to that portion of the Court's charge defining the status of Guarr and Mitchell (R. p. 124a), and had requested a special instruction to correct the Court's error (R. p. 125a). Subsequent to the verdict, defendant moved for a new trial, assigning this error as one of the grounds therefor (R. pp. 10a-11a). When all of this proved of no avail, defendant appealed. On appeal the judgment was affirmed, the Court of Appeals holding not that the evidence established conclusively as a matter of law that Guarr and Mitchell were defendant's agents (the position which the Trial Court took in its charge), but that "the jury was warranted in finding as a fact that Guarr and Mitchell were the employees of Doane" (Op. p. 3a), a finding which the jury never made, and which it was never permitted either to make or refute. And at two other points in the opinion the Court refers to the fact that "the jury could find that Guarr and Mitchell were employees of Doane" (Op. p. 5a) and that "there is, we think, enough in the record to warrant a jury finding * * * that Doane became the employer of Guarr and Mitchell" (Op. p. 6a). The entire opinion of the Court of Appeals is, therefore, based upon a misconception of what actually occurred at the trial. The question involved is not whether the jury *could* have found that Guarr and Mitchell were employees of Doane, but whether the Trial Court was justified in peremptorily instructing the jury that they were in fact the agents of Doane. On this latter question defendant respectfully submits that it should have prevailed, and it is much aggrieved by the holding of the Court of Appeals for the Sixth Circuit to the contrary.

Defendant attempted to correct this error on the part of the Court of Appeals by filing its petition to rehear

on April 19th, 1958; but this petition was promptly overruled on May 1, 1958. Thereafter, on May 9, 1958, the mandate of the Court issued, based upon its original judgment of affirmance.

V.

ARGUMENT.

The situation presented here is not one in which the extended citation of legal authorities would appear to be particularly helpful. If petitioner is correct in its position as to what happened at the trial of this cause, then there can be no doubt that the affirmance of the Court of Appeals was based upon a misconception and a false premise. No case can be cited to the effect that the presence of evidence in the record from which a jury could have made a certain finding justifies affirmance of the action of a court in making such a finding without submitting the issue to the jury, for no one has ever even suggested that this might be the case. And no authority is required to demonstrate that such action, if unjustified, results in a deprivation of defendant's right to a jury trial guaranteed under the Seventh Amendment to the United States Constitution. In fact, under the charge which the Trial Court gave in the instant case, if the jury found negligence on the part of Guarr and Mitchell which caused plaintiff's injuries (as it did—see Op. p. 2a), the only question left open would be whether the verdict should be against both defendant and co-defendant or against defendant alone; for the Court had already charged the jury that Guarr and Mitchell were defendant's agents, leaving it no discretion in this regard, and permitting it only to determine if they were also the agents of co-defendant. Thus defendant was deprived of its right to a jury trial upon one of the vital issues in the case, namely, whether or not Guarr and Mitchell were in

fact its agents, which it denied, and in support of which denial it introduced proof. That the Court of Appeals should affirm such action on the part of the Trial Court on the ground that *if* the issue had been submitted to the jury, there was evidence from which it *could* have found in accordance with the Trial Court's holding is incredible; and yet that is precisely what happened. To permit such a holding to stand would be to strike at the very roots of our jury system, for it clearly comes within the specific prohibition of the Seventh Amendment. If this can be done, why should any case ever be remanded for new trial? Why should not the appeal court simply say, as it has here, "there is evidence in the record from which the jury could find in accordance with our views, and so we enter judgment accordingly"? Why indeed, if this can be done, have jury trials at all?

True it may be that there is evidence in the record from which a jury might have found that Guarr and Mitchell were defendant's agents; but it is certainly equally true that there is evidence in the record from which it could have logically reached exactly the opposite conclusion. Plaintiff himself stated that Mitchell worked for Mr. Guarr and Mr. Hughes (and thus by inference that Guarr was Hughes' manager), and lived on the Hughes farm (R. pp. 21a-22a). Mr. Hughes testified that Guarr's employment was subject to his approval (R. pp. 35a-36a), that he was paid out of the Fayette Stock Farm account on which both Hughes and Doane had the right to issue checks (R. pp. 39a-40a, 50a), that Mitchell had lived on his farm prior to his contract with Doane and stayed on afterwards (R. p. 42a), that Mitchell was an employee of Fayette Farms and was on the farm payroll (R. pp. 43a; 50a), that he continued to perform the same services after the contract with Doane (R. p. 43a), and that Doane supplied no labor under

the contract (R. p. 44a). Mr. Moffett, an employee of and witness for defendant, testified that Mr. Guarr was employed by Mr. Hughes and paid by Fayette Stock Farm (R. pp. 58a, 60a, 65a, 67a, 74a-75a, "Fayette Stock Farm" is simply a business name which Mr. Hughes used R. p. 47a), that Jimmie Mitchell was also paid by Fayette Stock Farm by checks drawn on Mr. Hughes' account signed by persons authorized by him to draw on that account (R. pp. 60a-61a), that they were not, therefore, employees of Doane (R. p. 61a), and that Doane simply furnished management and managerial advisory service (R. p. 62a). In view of this, it is impossible to say other than that a clear cut issue of fact is raised by the evidence as to just who Guarr and Mitchell worked for. A jury having been demanded to try all issues in the case (R. p. 4a) and one having been empanelled for that purpose (R. p. 18a), defendant was entitled to have this issue submitted to it. Yet the Trial Court by its charge saw fit to withhold this issue from the jury and resolve it itself against defendant without the jury's intervention (R. pp. 112a-113a, 120a); and the Court of Appeals, *while recognizing by implication that a jury issue existed upon this point* (Op. pp. 3a, 4a-5a, 6a-7a), affirmed his action in so doing. Here then is paradox indeed, when an appeal court holds that a jury issue was properly determined by the trial court without a jury because there was evidence from which the jury could have reached a similar conclusion, although none from which it would have been compelled to do so.

The relationship of principal and agent is ordinarily a question of fact. *Mitton* v. *Granite State Fire Ins. Co.*, 196 F. 2d 988, 990 (10th Cir., 1952); *Pacific Can Co.* v. *Hewes*, 95 F. 2d 42, 46 (9th Cir., 1938); *Mackie* v. *Fuqua*, 14 Tenn. App. 176 (1931). Here there were facts introduced in evidence which are inconsistent with the existence

of the master-servant relationship as between Guarr, Mitchell and defendant, and are consistent only with the existence of that relationship as between those individuals and defendant Hughes. For example, the question of payment, while not conclusive, has been held to be "indicia of a contract of employment" in a case arising under Tennessee law and affirmed by this Court. *Walling* v. *Nashville, Chattanooga & St. Louis R.*, 60 Fed. Supp. 1004, 1007 (M. D. Tenn., 1945) aff'd 155 F. 2d 1016 (6th Cir., 1946), aff'd 67 S. Ct. 644, 330 U. S. 158, 91 L. Ed. 816. And in *Rice-Stix Dry Goods Co.* v. *Self*, 101 S. W. 2d 132, 20 Tenn. App. 498 (1937), it was said, "as long as the employee is furthering the business of his general employer * * * there will be no inference of a new relation unless command has been surrendered, and no inference of its surrender from the mere fact of its division" (At pp. 137, 505). Mitchell worked for Hughes before Doane came into the picture. He continued to perform the same duties after Hughes contracted with Doane for managerial services. How then can an inference of a new relationship arise—much less a conclusive inference which would justify the Trial Court in withdrawing this issue from the jury?

The Tennessee cases follow the almost universal rule that the master-servant relationship exists where "the employer's will is represented by the means as well as the result." *U. & C. Chem. Corp.* v. *Carson*, 192 Tenn. 150, 160, 239 S. W. 2d 27, 31, aff'd 72 S. Ct. 257, 342 U. S. 232, 96 L. Ed. 257 (1951). See also *Texas Co.* v. *Bryant*, 178 Tenn. 1, 152 S. W. 2d 627 (1941); *National Optical Stores* v. *Bryant*, 181 Tenn. 266, 181 S. W. 2d 139 (1944); *Sitz* v. *Bryant*, 184 Tenn. 600, 201 S. W. 2d 985 (1947). In this connection it is interesting to note the testimony of Mr. Moffett in this regard:

"Mr. Hughes is still running his place as positively as he ever ran it, and we are his agent to see that it is done."

(*R. p. 75a.*)

(Question by the Court) "Under your understanding of your arrangement with Mr. Hughes, would you consider that Mr. Hughes had the right to come out there on that particular day, June 11, 1956, and give Mr. Guarr instructions about how to rake the hay and how to operate the baler, and give instructions as to the details in connection with that operation?

A. Mr. Hughes had that right, but I don't think he would do it."

(*R. pp. 83a-84a.*)

Under Tennessee law "it is not a question of whether control was exercised, but whether the right of control existed." *Bush Brothers and Company* v. *Hickey*, 223 F. 2d 425, 426 (6th Cir., 1955). See also *Welch* v. *Reiling*, 170 Tenn. 698, 99 S. W. 2d 216 (1936); *Brademeyer* v. *Chickasaw Building Co.*, 190 Tenn. 239, 229 S. W. 2d 323 (1950).

On the other hand, here is what Mr. Moffett said about the lack of control on defendant's part:

Q. "Do you, as Regional Manager, after you have recommended a farm manager, or employees or tenants, do you undertake to go up there to the farm or do the details of plowing or cutting hay, or doing anything like that for Mr. Hughes?

A. Oh, no, no. Ours is strictly a management, managerial advisory service."

(*R. p. 62a.*)

Mr. Moffett testified that any man who Mr. Hughes wanted discharged would be discharged. "If he wants to fire some man, we will fire him", he said (R. p. 64a. See also R. pp. 69a, 82a.) Under Tennessee law, in determining whether the master-servant relationship exists, "the

right to discharge, or the absence of such right, is a circumstance of much importance." *Income Life Ins. Co.* v. *Mitchell,* 168 Tenn. 471, 477, 79 S. W. 2d 572, 574 (1935). See also *Welch* v. *Reiling, supra.*

Finally, a point which is perhaps minor, but one which has been endowed with a special significance by the Tennessee decisions, is the question of who pays the Social Security taxes. In this case it was Hughes (R. p. 60a). In *Brademeyer* v. *Chickasaw Building Co., supra,* it was held that the withholding and payment of such taxes on an individual "amount to at least some evidence that he occupied the status of an employee." (At pp. 245, 325).

It is apparent that there is at least some substantial evidence in the record from which the jury could have found that Guarr and Mitchell were the employees of Hughes and not of Doane had that issue been submitted to it. Upon its appeal, defendant was entitled to have this evidence viewed in the light most favorable to its contentions, a verdict in effect having been directed against it on this issue. This the Court of Appeals failed to do, saying merely that there was some substantial evidence contrary to defendant's contention on this point. The effect of the presence of such evidence in the record is to create, not to eliminate, a jury issue. This decision is, therefore, crucial to our system of jury trial; for if it is allowed to stand, one of the principles most basic to that type of trial will be overturned. In deciding this case as it has, the U. S. Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by a lower court, as to call for this Court's power of supervision (See Rule 19b). Its decision is likewise in direct conflict with those in *Mitton* v. *Granite State Fire Ins. Co.,* (10th Cir.), and *Pacific Can Co.* v. *Hewes,* (9th Cir.) *supra.* The ques-

tion presented upon this petition is, therefore, petitioner respectfully submits, of vast importance, not merely to it, but to the growth and development of the common law in this country, and should be finally and properly determined by this Court.

VI.

PRAYER.

Petitioner, therefore, respectfully prays that a writ of certiorari issue out of and under the seal of this Court, directed to the United States Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and proceedings in the case entitled on its docket: *Doane Agricultural Service, Inc.,* ~~*Reynold K. Hughes, dba Fayette Stock Farm,*~~ *Appellants,* v. *A. W. Coleman, Appellee,* Nos. 13,238 ~~and 13,230,~~ to the end that said case may be reviewed and determined by this Court, as provided by Section 1254 of Title 28 of the United States Code and the applicable rules promulgated by this Court governing applications for certiorari in civil cases, and that the judgment of the Court of Appeals be reversed by this Honorable Court and the case remanded to the United States District Court for the Western District of Tennessee with instructions that it be tried anew before a jury, and that

petitioner have such other and further relief in the premises as to this Honorable Court may seem right and proper.

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CERTIFICATE OF SERVICE.

I, WALTER P. ARMSTRONG, JR., a member of the Bar of the Supreme Court of the United States of America, certify, in conformity with Rule 23 of that Court, that a copy of the foregoing Petition was served upon Respondent, A. W. Coleman, and Co-Defendant, Reynold K. Hughes, d/b/a Fayette Stock Farm, pursuant to Rule 33 of that Court, by delivering the same at the office of counsel of record of each of them to said counsel or to a clerk therein, this ..... day of June, 1958.

WALTER P. ARMSTRONG, JR.,
Attorney for Petitioner, Doane Agricultural Service, Inc.

APPENDIX A.

(Filed April 4, 1958. Carl W. Reuss, Clerk.)
Nos. 13238-39

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOANE AGRICULTURAL SERVICE, INC., REYNOLD K. HUGHES, dba FAYETTE STOCK FARM, *Appellants*,

v.

A. W. COLEMAN, *Appellee*.

APPEALS from the District Court of the United States for the Western District of Tennessee.

Decided April 4, 1958

Before SIMONS, Chief Judge, MILLER and STEWART, Circuit Judges.

SIMONS, Chief Judge. Appellant Hughes was the owner of the Fayette Stock Farm, in Tennessee. Since his home was in Tulsa, Oklahoma, and he could give only intermittent supervision to the farm, he entered on December 6, 1955, into a management contract with Doane Agricultural Service, Inc., for the planning and execution of operations on the farm. By the terms of the writing, Doane was given the right to hire and fire all of the employees of the farm, including the utilization or nonuse of its tenant farmers, and had the right to supervise the work of all employees and tenants. It was to collect all revenues and pay all expenses out of such revenue. It was to determine the crops to be grown and where; the conservation of the soil by crop rotation, erosion controls and soil treatment; it was to make plans for maintenance, repair, and removal of buildings, subject to approval by Hughes, and to report to Hughes regarding the progress of the work and condition of the farm. For this service, it was to receive a fee of $150.00 per month. The contract, however, provided that it was not to be the whole agreement between the parties but was only to outline

broad duties, compensation, period of operation, and method of termination. Wages of employees were to be paid out of the farm's bank account by checks drawn by an employee of Doane. Hughes would make observations on the farm after Doane's plans had been submitted and approved by him and felt that he could get cooperation of Doane in making any changes.

Coleman lost his arm in a hay baling machine, on June 11, 1956, while in the employ of one Blaylock doing baling on the farm. He brought suit against both appellants; recovered against both in a trial to a jury and both appealed, their appeals being consolidated for hearing. The Coleman suit was based upon alleged negligence on the part of each of the appellants. The liability of Doane was grounded on the fault of Guarr, the farm manager, and one Mitchell who was on the baling machine when Coleman was injured and liability was imputed to Hughes on the theory that he was responsible for the acts of Doane and Doane's employees under the law of agency.

The accident to Coleman happened in this wise. While operating the baling equipment, on June 11, 1956, Coleman was advised by Guarr, the farm manager, that the bales were not being properly formed and was ordered by Guarr to get off the tractor, which provided the power to move and operate the baler, and let Mitchell get on the tractor and operate it, while Coleman made adjustments. Coleman obeyed and while observing operation by Mitchell discovered that a cord was not knotting properly. He asked Mitchell to disengage the clutch of the tractor which would stop its movement and also the operation of the baler. He then went to the baler to adjust the cord. He put his right arm in the rollers for that purpose and lost it. There is conflict in the evidence as to whether the rollers were moving at the time Coleman undertook to make the adjustment or whether they were stopped. *The Court submitted this issue to the jury which, by its verdict, necessarily found that the injury to Coleman resulted proximately from some fault of Mitchell, or of Guarr, or both;* Guarr's fault being its order to Coleman to leave the tractor and installing Mitchell thereon, Mitchell being inexperienced in the operation of the baler.

Both Doane and Hughes allege contributory negligence on the part of Coleman, charge that he assumed the risk of injury when he approached the baler, and that Mitchell was a fellow servant of Coleman. They argue that the record establishes these defenses as a matter of law and

that they should not have been submitted to the jury for determination. It may be true, of course, that where facts are undisputed or permit of only a single inference, a question of law arises but, where the facts are in dispute, their ascertainment is, upon recognized principles, a question for the jury and we find no error in submitting to the jury to determine what really happened, as disclosed by or reasonably to be inferred from the evidence.

Blaylock was clearly, upon this record, an independent contractor. He was in the business of baling hay for those who wished his services, furnishing his own equipment, and Coleman was his employee sent to the farm to run the baling machine. He had been engaged by Guarr, the farm manager, and the question presented is, "By whom was Guarr employed?" There is evidence that he was engaged by Doane, through its independent action, notwithstanding approval by Hughes at a later date. Under the terms of the contract and its practical construction Doane had exercised his right to hire and fire employees. Doane's contention that Guarr was the employee of Hughes, as a matter of law, must be rejected. So, too, with Mitchell, who as an employee on the farm was retained by Doane, when it took over management of the farm. *The jury was warranted in finding as a fact that Guarr and Mitchell were the employees of Doane.*

The contention that Mitchell was a fellow servant of Coleman is without support in the record. Coleman was the employee of Blaylock. There is no evidence that Blaylock, either individually or through Coleman, exercised any control over Mitchell. There is no evidence that Blaylock hired him, or paid him, or, so far as the record shows, even knew him. Such orders as were given to Mitchell to operate the tractor emanated from Guarr and the Fellow Servant Rule contended for by Doane is clearly without application here.

There was no evidence upon which the jury could find that there was assumption of risk by Coleman. While Mitchell was not experienced in the operation of the hay baling machine, he had operated it under the eye of Coleman while the latter was making observations as to defective baling by the hay baler. Coleman had carefully warned him of the danger in its operation, had asked him to disengage the clutch of the tractor while he was making adjustments and had explained that disengagement would stop both its movement and operation. The disengagement of the clutch was a simple operation and there was nothing to warn Coleman that Mitchell would fail to

follow specific direction to shut off power to both the tractor and baler. If this had been done, there was no discernible risk to be assumed by Coleman. The testimony of Coleman reasonably permits an inference that he acted with due care for his own safety. The law of Tennessee, as elsewhere, provides that whether or not a plaintiff acted with due care is one for determination by the jury. *Osborne, et al.* v. *City of Nashville*, 182 Tenn. 197.

With these defenses set aside, the controlling question in the case revolves about the relationship of Doane and Hughes to Coleman and to each other. The Tennessee cases have defined "agency" in its broadest sense to include "every relation in which one person acts for or represents another." *Howard, et al.* v. *Haven, et al.*, 198 Tenn. 572; *Gulf Refining Company* v. *Huffman and Weakley*, 155 Tenn. 580. The cases largely determine that an employee status is determined by whether the alleged employer has the right of control over the method as distinguished from the results and look to such things as the right to hire and fire, to direct the manner and method of the work, as to who paid the wages, whether the pay was based upon time or by the job, whether the work was ordinary labor, or skilled labor, and who provided the tools for the work. *Rose* v. *Snyder*, 185 Tenn. 499, 514; *Mayberry* v. *Bon Aire Chemical Company*, 160 Tenn. 459. See *Conasauga River Lumber Company* v. *Wade*, 221 F. (2d) 312 (C. A. 6).

The doctrine of respondeat superior seems to have had two bases in Tennessee law. The first is that a principal is responsible for the tortious acts of his agent if he has a right to control the agent. *National Life & Accident Insurance Company* v. *Morrison*, 179 Tenn. 29, *Gulf Refining Company* v. *Huffman & Weakley, supra.* The second is that the principal does for himself what he does through another. *Howard* v. *Haven, supra; Electric Light & Power Company* v. *Bristol Gas & Electric Light Company*, 99 Tenn. 371. It was said in the *Gulf Refining* case, *supra*, "in every case the decisive question is, had the defendant the right to control, in the given particular, the conduct of the person doing the wrong"? By the contract between Hughes and Doane, Doane had the right to hire and fire all of the employees of the farm, including the engagement of the tenant farmers, and the right to supervise the work of both employees and tenants, and did so. It is apparent that Doane had considerable latitude in controlling employment and the manner and

method of the farming operation under the contract, so that *the jury could find that Guarr and Mitchell were employees of Doane and, under appropriate instructions, that Doane was liable for the negligence of Guarr and Mitchell.* But in the overall area of planning and performance a large degree of control was reserved by Hughes. The plan of operation was to be submitted to Hughes for his approval. Maintenance, repair and removal of buildings was, likewise, subject to his approval. Doane was obliged to report to Hughes periodically on the progress of the work and the condition of the farm. The wages of employees were to be paid out of the revenues of the farm belonging to Hughes. Having in mind that the written agreement was not the whole arrangement between Hughes and Doane, the jury was warranted in considering its practical construction by the acts of the parties thereto. Hughes testified that it was his understanding that if he had disapproved of the employment of Guarr, as farm manager, he would have expected that Doane would have cooperated. The testimony of Moffett, regional director for Doane, is revealing as to the understanding of the parties in construing the arrangement. It was Doane's general practice, according to Moffett, to follow the wishes of its clients, and knowing that Mr. Hughes had some very definite ideas of what he wanted done, transmitted those views to Doane and Doane tried to carry them out. He testified: "No, our interest ends when we have done what a client asks us to do . . . but, in this case, it covers to seeing, it seems, the farm is operated as nearly as we know how according to Mr. Hughes' desire . . . Mr. Hughes gives his instructions to us, we give ours to Mr. Guarr." It will thus appear that a large measure of control over the operations of Doane was to be exercised by Hughes and comes within the principle enunciated in the *Morrison* case, "that a principal is responsible for the tortious acts of his agent if he has a right to control the agent." *National Life & Accident Ins. Co.* v. *Morrison*, 179 Tenn. 29; *Gulf Refining Co.* v. *Huffman & Weakley, supra*, and that the principal does for himself what he does through another. *Electric Light & Power Co.* v. *Bristol Gas & Electric Light Co.*, 99 Tenn. 371.

Doane urges upon us a principle stated in some of the Tennessee cases that an agent has no responsibility for the acts of sub-agents and, so, Doane is not liable as a matter of law for the negligence of Guarr and Mitchell, but Guarr was selected by Doane and Mitchell, originally

an employee or tenant of Hughes, was retained by Doane. There was no obligation on the part of Doane to hire Guarr as farm manager or to keep Mitchell. They were in no sense sub-agents of Hughes. They were employees of Doane and the mere fact that their employment may have been subject to approval by Hughes does not place them in the category of sub-agents.

It must be remembered that Doane was a corporate entity and could act only through individuals. To hold that employees independently hired by an agent and not shown to be employees of both principal and agent are sub-agents would make all corporate servants subagents of the principal. We do not think that is the law of Tennessee and we find no Tennessee case that says so. In any event, there is no substantial evidence showing an employment relationship between Hughes on the one hand and Guarr and Mitchell on the other to warrant submission of the question of subagency to the jury. It is true, of course, that the wages of Guarr and Mitchell were paid out of the revenues of the farm and its profits, if any, would ultimately belong to Hughes. Such revenues were under the practical control of Doane and the wage schedule and the persons to whom wages were paid were, likewise, within its control. There is no evidence in the record that Hughes signed any pay checks. The payment of wages is but one of the secondary tests relied upon to determine the existence of the employer-employee relationship. In the *Conasauga River Lumber Co.* v. *Wade, supra*, in reliance upon *Rose* v. *Snyder*, 185 Tenn. 514, it was said: . . . " 'This right of control is the distinguishing mark which differentiates the relation of master and servant from that of employer and independent contractor. Other factors are looked to only to aid in determining whether such right existed in a given case. . . . Wherever the defendant has had such right of control, irrespective of whether he exercised it or not, he has been held to be the responsible principal or master.' " The District Judge was not in error in concluding that Guarr and Mitchell were employees of Doane.

While the degree of control by a principal over his agent, in order to make the principal liable for the agent's acts, is not specifically indicated in any of the Tennessee cases, *there is, we think, enough in the record to warrant a jury finding that Doane was under the control of Hughes in the overall operations of the farm; that Doane became the employer of Guarr and Mitchell under the doctrine of respondeat superior and that*

Doane was liable for the fault of Guarr or Mitchell proximately amounted to negligence. Our views are supported by Sec. 362 of the Restatement of the Law of Agency: "An agent is liable to third persons for the conduct of subagents and of his servants under the same conditions which make a principal liable for the conduct of an agent or servant." In its comment under that section the American Law Institute states: (a) "For some purposes, a sub-agent is an agent of the principal, since he acts on the principal's account and is subject to his ultimate control in the performance of acts done for him. He is also, however, an agent of the agent and subjects the latter to liability within the sphere of activity in which he is authorized to act, in accordance with the rules dealing with the liability of the principal for the conduct of an agent stated in Sec. 212-219."

"(b) An agent employing a servant upon the principal's affairs is subject to liability for the conduct of such a servant to the same extent as is any master."

Other contentions of the appellants have been considered and found to be without merit.

The judgments entered in the District Court are hereby affirmed.

(Emphasis supplied by Petitioner to indicate portions of opinion referred to in petition.)

APPENDIX B.

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Western District of Tennessee—Greeting:

WHEREAS, lately in the United States District Court for the Western District of Tennessee, before you or some of you, in a cause between A. W. Coleman, Plaintiff, and Reynold K. Hughes, dba Fayette Stock Farm, and Doane Agricultural Service, Inc., Defendants (D. C. No. 2978 Civil), a judgment was entered on the 14th day of December, 1956, in favor of said Plaintiff and against said Defendants;

AND WHEREAS, the said Doane Agricultural Service, Inc., appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord, one thousand nine hundred and fifty seven, the said cause came on to be heard before the said United States Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable Earl Warren, Chief Justice of the United States, the ninth day of May in the year of our Lord one thousand nine hundred and fifty-eight.

/s/ Carl W. Reuss,
Clerk, United States Court of Appeals for the Sixth Circuit.

COSTS—	(NONE)
Clerk	$
Printing record	$
Attorney	$
Total	$

No. 13,238

United States Court of Appeals
For the Sixth Circuit

Doane Agricultural Service, Inc.,

vs.

A. W. Coleman

Mandate.

SUPREME COURT, U. S.

FILED
AUG 6 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

No. [redacted].108

DOANE AGRICULTURAL SERVICE, INC.,
Petitioner,

vs.

A. W. COLEMAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1074.

DOANE AGRICULTURAL SERVICE, INC.,
Petitioner,

vs.

A. W. COLEMAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

QUESTIONS PRESENTED.

The question presented by the petitioner is:

Whether, where a Trial Court peremptorily instructs a jury that the master-servant relationship exists, a Court of Appeals is justified in affirming on the sole ground that there was in the record evidence from which the jury could have so found? The question involved is not whether

the jury could have found that Guarr and Mitchell were employees of Doane, but whether the Trial Court was justified in peremptorily instructing the jury that they were, in fact, the agents of Doane (petition for writ of certiorari, pages 2 and 6).

I.

STATEMENT.

References prefixed by the letter "b" are to pages of the Appendix of the Respondent filed in the Court of Appeals. References prefixed by the letters "OP" are to pages of the Opinion of the Court of Appeals in the instant case and found in Appendix to Petition for Certiorari. References prefixed by the letter "R" are to pages of the Joint Appendix of Petitioner and its co-defendant filed in the Court of Appeals in this case.

The pertinent facts found by the Court of Appeals may be summarized as follows:

"* * * and the question presented is, by whom was Guarr employed? There is evidence that he was engaged by Doane, through its independent action, notwithstanding approval by Hughes at a later date. Under the terms of the contract and its practical construction, Doane had exercised his right to hire and fire employees. Doane's contention that Guarr was the employee of Hughes, as a matter of law, must be rejected. So, too, with Mitchell, who as an employee on the farm was retained by Doane, when it took over management of the farm." (Op. p. 3a). "Doane urges upon us a principle stated in some of the Tennessee cases that an agent has no responsibility for the acts of sub-agents and, so, Doane is not liable as a matter of law for the negligence of Guarr and Mitchell, but Guarr was selected by Doane, and Mitchell, originally an em-

ployee or tenant of Hughes, was retained by Doane. There was no obligation on the part of Doane to hire Guarr as farm manager or to keep Mitchell. They were in no sense sub-agents of Hughes. They were employees of Doane and the mere fact that their employment may have been subject to approval by Hughes does not place them in the category of sub-agents." (Op. pp. 5a-6a). "In any event, there is no substantial evidence showing an employment relationship between Hughes on the one hand and Guarr and Mitchell on the other to warrant submission of the question of sub-agency to the jury." (Op. p. 6a). "The District Judge was not in error in concluding that Guarr and Mitchell were employees of Doane." (Op. p. 6a). "Our views are supported by Sec. 362 of the Restatement of the Law of Agency: An agent is liable to third persons for the conduct of sub-agents and of his servants under the same conditions which make a principal liable for the conduct of an agent or servant. In its comment under that section the American Law Institute states: (a) For some purposes a sub-agent is an agent of the principal, since he acts on the principal's account and is subject to his ultimate control in the performance of acts done for him. He is also, however, an agent of the agent and subjects the latter to liability within the sphere of activity in which he is authorized to act, in accordance with the rules dealing with the liability of the principal for the conduct of an agent stated in Secs. 212-219. (b) An agent employing a servant upon the principal's affairs is subject to liability for the conduct of such a servant to the same extent as is any master." (Op. p. 7a).

The above quotations from the opinion of the Court of Appeals show conclusively that said Court did not, as contended by petitioner, affirm the judgment of the District Court on the ground that there was only evidence in

the record from which the jury could have so found. On the contrary, they show that the Court of Appeals found that there was no substantial evidence to warrant submission of this issue to the jury.

The opinion of the Court of Appeals was rendered on April 4, 1958. Petitioner filed a Petition to Rehear on April 19, 1958, and same was denied on May 1, 1958. Petitioner did not file a motion to stay the mandate in order to file a petition for certiorari in this Court as provided in Rule 24 of the Rules of the Court of Appeals, Sixth Circuit, and the mandate of said Court was issued on May 9, 1958, and received by the District Court on May 12, 1958. Petitioner filed a motion to recall and stay the mandate in said Court on May 14, 1958, and on May 15, 1958, withdrew said motion and voluntarily paid one-half of the judgment, interest and costs and the other one-half was paid by its co-defendant, Reynold K. Hughes d/b/a Fayette Stock Farm, despite the fact that no execution had been issued. The District Court entered an order of distribution on May 23, 1958, and the proceeds of the judgment were accordingly dispersed. No further action was taken by petitioner until June 16, 1958, when the petition for certiorari was filed in this Court. We, therefore, submit that only a moot question is presented.

It is interesting to note that petitioner now contends that the question of whether Guarr and Mitchell were employees of Doane or of its co-defendant, Hughes, presented a jury question. As a matter of fact, the first time petitioner made any such contention was in the Court of Appeals. Throughout the trial in the District Court petitioner strongly contended that this was a question of law to be determined by the Court. In its opening statement to the jury petitioner stated "But, regardless of the legal relationship and whose employee was working for who—

His honor will tell you that—" (b. p. 9), and in its argument in support of its motion for a directed verdict in the District Court petitioner stated "Mr. Braden: I want to state the specific grounds of my motion at this time. First, that the undisputed proof—the contract, the written contract in this case that has been introduced does not leave the question for the jury to determine the relationship between the parties." (R. p. 99a); and further, "Now, if Your Honor please, Your Honor is passing—I assume that Your Honor is going to leave to the jury to determine whose employees these people were, when there is a written contract. The evidence is not disputed as to the relationship. Now, this might be a suit between Mr. Hughes and the agency for mismanagement and conduct outside of the contract might be looked to. But here, if Your Honor please, if this case goes to the jury on the relationship, His Honor is passing to that jury a legal question. Now, I say this in all frankness, I say it is a legal question. If, under the facts of this case, that the Doane Agricultural Service is an independent contractor, that we are responsible for every tenant and every person that they employ on these farms that they manage. But Your Honor should act before the jury and let Mr. Hughes out. If that is the law, we ought to know it." And further, "* * * as I said, the contract is here, and we accept every legal obligation that the contract imposes upon us". (R. p. 100a). Thus it will be seen that petitioner was not insisting in the District Court that the matter be left to the jury as a factual issue but was insisting that it was a matter of law to be decided by the Court. The only real complaint of petitioner is that it was decided against him. Petitioner states that it excepted to the action of the District Court in failing and refusing to submit this issue of fact to the jury and that it submitted special requests to that effect. Actually, the special requests referred to

by the petitioner, had they been given, would have amounted to a directed verdict of acquittal for petitioner because the only possible way that petitioner could be held involved in this lawsuit was through the negligent actors, Guarr and Mitchell. The special requests referred to are as follows:

> "Special Instruction No. I Requested by Defendant, Doane Agricultural Service, Inc. Refused—Boyd J.
>
> 'Gentlemen, you are instructed that the defendant, Doane Agricultural Service, Inc., under the undisputed facts in this case, was an agent of the defendant, Reynold K. Hughes and managing and servicing his farm. As such agent, this defendant is not liable for any negligent acts of any sub-agent or employee of the defendant Hughes.'
>
> "Special Instruction No. 2 Requested by Defendant, Doane Agricultural Service, Inc. Refused—Boyd, J.
>
> 'You are instructed that even though you find that the farm manager, Mr. Guarr, or the farm employee, J. Mitchell. were guilty of any acts of negligence which proximately contributed to the plaintiff's injuries, their negligence would not be imputed to the defendant, Doane Agricultural Service, Inc., and you would not be justified in returning a verdict against the defendant, Doane Agricultural Service, Inc., for any act of negligence that you might find in the preponderance of the evidence that was committed by either, Mr. Guarr, the farm manager, or J. Mitchell.'" (R. p. 125a).

At no time, in the District Court, did the petitioner even suggest that the question should be left to the jury but was on the contrary stoutly maintaining that it was a legal question to be decided by the Court. The District

Court refuted petitioner's contention in this regard in no uncertain terms?: "The Court: Well, who is Doane? Doane was Guarr, wasn't he? He was running the farm. Doane was an agency, I take it, which performs this service for numerous people."? "Mr. Braden: Yes, sir, farms anywhere with non-residents." "The Court: You are reading some things into this that are not here. Doane isn't a sub-agent. I mean, Guarr was not a sub-agent. Is that what you are saying, a sub-agent?" (B. pp. 23-24.)

The Court of Appeals affirmed the action of the District Court. "The District Judge was not in error in concluding that Guarr and Mitchell were employees of Doane." (Op. p. 6a).

We, therefore, pose the question, should this Court grant the petition for certiorari and remand the case to the District Court for a re-trial as requested by petitioner herein, is it not logical to conclude that the District Court would again direct a verdict against the contentions of petitioner herein and since the Court of Appeals has already approved this course of action on the part of the District Court, what ultimate benefit could the petitioner obtain? Regardless of the fault petitioner finds with the Court of Appeals' opinion, the fact remains that it unequivocally approved the action of the District Court and there is no apparent reason why a re-trial would result in a different outcome. The Court of Appeals denied the petition to rehear without opinion and we think it is apparent that said Court considered petitioner's contentions in this regard and found them without merit.

We submit further that petitioner's co-defendant, Reynold K. Hughes d/b/a Fayette Stock Farm, is an indispensable party to this action and that the petition for certiorari should be denied for the reason that petitioner

did not make him a party hereto. We suggest that since defendant and its co-defendant voluntarily, and not under execution, paid the judgment, interest and costs, that any further litigation should be confined to the two defendants and that respondent herein is only a nominal party as the proceeds of the judgment have been paid and dispersed and the matter ended insofar as this respondent is concerned.

Petitioner stated on Page 12 of its brief "This the Court of Appeals failed to do, saying merely that there was some substantial evidence contrary to defendant's contention on this point." No record citation is given and for obvious reasons. Actually, this is what the Court said: "In any event there is no substantial evidence showing an employment relationship between Hughes on the one hand and Guarr and Mitchell on the other to warrant submission of the question of sub-agency to the jury." (Op. p. 6a). It is clear from the testimony of the petitioner's District Manager that petitioner had sole and complete charge of the farm manager, Mr. Guarr. "Q. It is your contention, then Mr. Moffat—I don't know these things unless I ask you, and don't believe the jury knows—is it your contention that Mr. Guarr was the high mogul, you might say, or the man in charge of that farm? I mean by that as distinguished between Doane and Guarr, was Guarr the man there in charge?" "A. Mr. Hughes gives his instructions to us; we give ours to Mr. Guarr." (R. p. 75a).

Petitioner's co-defendant, Hughes, testified: "A. Well, partly that. If I saw something I would like changed I would come in and discuss it with Mr. Moffe t, not Mr. Guarr." (R. p. 38a). And further, "The Court: Well, when Doane took over, was it part of your understanding with Doane that these people who lived on the farm would be subject to his direction in the farming operation? Is that

what you are telling us?" "A. It was my understanding —I did not interfere—there was no understanding they would keep them or fire them or anything. That was left entirely to Doane." (R. p. 46a). And further, "Q. Did you maintain any control over him or any other employee since you left?" "A. No, sir." "Q. Did I understand you to say that when they took the contract over they could have fired the whole group, or retain some of them as they did Jimmy Mitchell?" "A. Yes, sir." (R. p. 48a).

II.

ARGUMENT.

The judgment of the Court of Appeals is correct and is not in conflict with any other decision so as to warrant review of the case by this Court.

III.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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and

JAMES R. WINCHESTER,

LEE WINCHESTER, SR.,
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Attorneys for Respondent.

CERTIFICATE OF SERVICE.

I, Lee Winchester, Sr., a member of the Bar of the Supreme Court of the United States of America, certify, in conformity with Rule 23 of that Court, that a copy of the foregoing Brief for the Respondent in Opposition to the petition for a writ of certiorari was served upon the petitioner, Doane Agricultural Service, Inc., and its co-defendant, Reynold K. Hughes, d/b/a Fayette Stock Farm, pursuant to Rule 33 of that Court by delivering the same at the office of counsel of record of each of them, to said counsel or to a clerk therein, this day of August, 1958.

Lee Winchester, Sr.,
Attorney for Respondent,
A. W. Coleman.